May 11, 2011

Mr. David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.W.
Washington, DC 20549

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Re: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant" and "Eligible Contract Participant," RIN 3038-AD06 and RIN 3235-AK65.

Dear Mr. Stawick, Ms. Murphy, and Ms. Johnson:

The undersigned banks ("Banks")[1] are pleased to submit these comments to the Commodity Futures Trading Commission (the "CFTC"), the Securities and Exchange Commission ("SEC") (jointly with the CFTC, the "Commissions"), and the Board of Governors of the Federal Reserve System, in response to the joint proposed rule issued by the Commissions to further define the terms "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," Major Security-Based Swap Participant," and "Eligible Contract Participant" (the "Proposed Rules"),[2] as required by the Dodd-Frank Wall Street Reform and Consumer

[1] Each of the Banks provides loans and other financial services to American businesses, including swaps to hedge or mitigate commercial risk, and among their role in financing other sectors of the economy, each Bank is committed to serving middle market companies that collectively employ more people than large companies combined.

[2] Notice of Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant," and "Eligible Contract Participant." 75 Fed. Reg. 80178 (December 21, 2010).

Protection Act ("Dodd-Frank"). The Banks respectfully urge the Commissions to address several issues related to the definition of Eligible Contract Participant ("ECP") through their definitional rulemaking authority under Dodd-Frank. For the reasons set forth below, we believe that the actions we are recommending are fully consistent with the purposes and intent of the CEA and Dodd-Frank and will not result in any adverse consequences.

Treatment of Swap Transactions with non-ECPs who are jointly and severally liable for loan obligations with an ECP

Section 723 of Dodd-Frank repeals the exclusions and exemptions for transactions between eligible contract participants ("ECPs") that previously existed under the Commodity Futures Modernization Act of 2000 from most provisions of the Commodity Exchange Act ("CEA"). Notwithstanding these changes, the ECP definition remains relevant and significant for purposes of a number of provisions of the CEA. Specifically, Section 723 of Dodd-Frank makes it unlawful for a market participant, other than an ECP, to enter into a swap unless the swap is executed on a designated contract market. Section 763(e) of Dodd-Frank makes it unlawful for a market participant, other than an ECP, to enter into a security-based swap unless the security-based swap is entered into on a national securities exchange. As a result, only ECPs will be permitted to enter into swaps on a bilateral, off-exchange basis, to the extent otherwise permissible, and only ECPs will be permitted to enter into swaps on swap execution facilities.

However, the definition of an ECP needs to be clarified in certain respects, in light of the changes to the CEA effected by Dodd-Frank, and should be further modified by the Commissions in the proposed rules to address several problems not directly addressed by Title VII of Dodd-Frank. For example, new Section 1a(49)(A)(iv) of the CEA permits a bank to enter into swap transactions with a borrower in connection with a loan made to that borrower without becoming a swap dealer. This provision is of particular interest to banks as it relates to a standard type of financing structure where banks offer borrowers floating rate loans and borrowers hedge the interest expense through interest rate swaps. This not only protects borrowers from interest rate increases, but also protects banks and their assets (the loans) should rates rise above a borrower's ability to service its debt. In this context, however, the definition of an ECP is too narrow to allow banks, and their borrowing customers to effectively utilize this provision of Dodd-Frank to the fullest extent intended and will, therefore, limit borrowing opportunities, especially for privately-held small and medium-sized businesses. It will also increase the risk to banks of holding these unhedged assets.

For example, each Bank often enters into loan agreements with more than one borrower each of which is part of the same organizational structure. The borrowers may include a parent, its subsidiaries or other affiliates (or associated persons in the case of a partnership). Not all of these borrowers will necessarily be ECPs. Typically, each borrower is jointly and severally liable for the obligations under the loan agreement. In addition, the loan may be

secured by collateral owned jointly by the ECPs and the non-ECPs. Alternatively, ECPs may be borrowers under the loan agreement, and their obligations may be guaranteed by the non-ECPs.

In some instances, given the fact that both the ECPs and non-ECPs are obligated under the loan agreement, they may want to hedge their joint exposure to the loan agreement by entering into an interest rate swap. Because the borrowers are jointly and severally liable under the loan agreement, they likely will seek to enter into the related swap on the same basis. We strongly believe that, provided that at least one of the borrowers entering into the swap is an ECP, and the parties are jointly and severally liable for all obligations under the swap, the transaction should not need to be executed on a DCM. Indeed, it is virtually impossible in any event, as a practical matter, to execute on a DCM the types of customized interest rate swaps that are typically entered into in connection with a loan, especially when the customer needs a matching hedge to satisfy hedge effectiveness criteria under FAS 133 to achieve hedge accounting treatment. It is for this reason that Congress allowed non-financial entities to avoid the trade execution and clearing requirements. Imposing the execution and clearing requirements in the context of a loan to multiple borrowers, therefore, will serve only to prevent many borrowers from hedging their obligations under loans. This in turn may restrict or foreclose necessary borrowings.

We, therefore, urge the Commissions to use their authority under Section 712(d)(1) of Dodd-Frank, to clarify, in circumstances where there is a "joint and several counterparty" (i.e., a counterparty to a swap or security-based swap that is composed of multiple obligors that are jointly and severally liable under the swap or security-based swap), that, provided at least one of the obligors is an ECP as defined in Section 1a of the CEA, each obligor will be deemed to be an ECP if the transaction is entered into to manage risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by a business[3] with which such obligor is affiliated or in which such obligor has an economic or financial interest.[4] Furthermore, we believe that the Commissions should amend their proposed rules to state that a guarantee of an ECP's obligations under a swap or security-based swap by a non-ECP

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[3] For this purpose the term "business" should be construed to include a joint venture.

[4] We also note that under new Section 1a(18)(C) of the CEA, as amended by Dodd-Frank, the statutory definition of ECP includes "any other person that the Commission determines to be eligible in light of the financial or other qualifications of the person." Therefore, in addition to its authority under Section 712(d)(1) of Dodd-Frank, the CFTC has the authority to include within the definition of ECP the categories of market participants described above.

will be enforceable to the full extent of the swap obligations.[5] We believe that such clarification will provide legal certainty to market participants that routinely enter into agreements with ECPs that may be guaranteed by non-ECPs (for the same reasons that ECPs and non-ECPs should be allowed to hedge assets and liabilities where they jointly share an economic interest), while fully satisfying the objectives of Dodd-Frank. A contrary reading of the Commissions' rules, or uncertainty on these issues under the CEA, will make it more difficult and more expensive for borrowers to finance their businesses or to hedge their risk exposures with no enhancement of customer or market protections.

Discretionary investments considered in qualifying an individual as an ECP

As revised by Dodd-Frank, new Section 1a(18)(A)(xi) of the CEA defines an ECP as "an individual who has amounts invested on a discretionary basis, the aggregate of which is in excess of (I) $10,000,000; or (II) $5,000,000 and who enters into the agreement, contract, or transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual." The release accompanying the Proposed Rules noted that the "monetary component of ECP status for individuals remains the same under the amended ECP definition."[6] However, this is not entirely accurate. Under the revised definition, an individual must have more than $10 million, but now "invested on a discretionary basis," not "total assets," or $5 million if the transactions for which ECP status is necessary are "for risk management of an asset or liability the individual owns or incurs, or is reasonably likely to own or incur." Dodd-Frank did not define "discretionary" nor did the Proposed Rules provide any clarification as to what assets are considered "discretionary" for the purposes of the definition of ECP. Furthermore, the legislative history of Dodd-Frank is silent as to congressional intent in revising the definition from "total assets" to amounts invested on a discretionary basis.

We, therefore, urge the Commissions in their rulemaking to provide interpretive guidance to market participants as to what constitutes "amounts invested on a discretionary basis." Among the items that we believe should qualify for this purpose are cash or currency deposits in an account at a "financial institution" as defined in the CEA. An individual should not be required to convert bank deposits into another form of investment and thereby qualify as

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5 For example, banks routinely lend to partnerships on the strength of the assets of the partnership combined with guaranties of the general partners, and, therefore, the guaranties would extend to the partnership's swap obligations incurred to hedge the loan. If a partnership qualifies as an ECP, then the bank will want legal certainty that the guaranty is still valid for its swap obligations even if the guarantor is not an ECP.

6 75 Fed. Reg. at 80184, fn. 59.

an ECP just so he or she can enter into a swap or security-based swap to manage the risk of another asset or liability. We also urge the Commissions to find that any assets owned by an individual in order to conduct a business or otherwise to make a profit (excluding property for personal use such as an individual's private residence or automobile) are investments made on a discretionary basis. Furthermore, we urge the Commissions to provide market participants with additional guidance regarding the nature and timing of the evidence that would be required to establish that an individual has satisfied the requirements of the definition.

ECP Operating a Sole Proprietorship

As revised by Dodd-Frank, new Section 1a(18)(A)(v) of the CEA defines an ECP "as a corporation, partnership, proprietorship, organization, trust, or other entity that… has a net worth exceeding $1,000,000 and [that] enters into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business." However, neither Dodd-Frank nor the CEA define "proprietorship" and we urge the Commissions to provide guidance on the requirements that are necessary to establish that a market participant is operating a proprietorship.

One form of proprietorship is a sole proprietorship, which is a business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity. As a general matter, state law does not require any formal documentation to establish or operate a sole proprietorship.[7] In addition, a sole proprietorship is not a separate taxable entity, as a sole proprietor reports the income or loss of the business on a separate schedule that is attached to his or her individual federal income tax return, and the business income or loss is taxed along with the sole proprietor's other income.[8] Therefore, a natural person running a business, such as a retail store or family farm, would be a sole proprietor for purposes of qualifying as an ECP for swap transactions. Clearly, by including the word "proprietorship" in this element of the ECP definition, Congress intended to include within the definition an individual acting as a sole proprietor and to allow that individual (together with a spouse or other family member that may jointly own the business or its assets) to operate under this subsection of the definition of an ECP, rather than the subsection dealing with individuals. Under such circumstances, although the sole proprietor is an individual, he or she is operating, by definition, in a business context and not in his or her capacity as an individual.

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7 Steven C. Alberty, Advising Small Businesses ¶ 2.2 (2011), *available at* Westlaw ADVSB.

8 Steven C. Alberty, Advising Small Businesses ¶ 2.46 (2011), *available at* Westlaw ADVSB.

We strongly support this distinction and this treatment of individuals operating as proprietorships, including sole proprietorships, for purposes of Section 1a. However, we believe that greater clarity and legal certainty are needed to effectuate Congress's intent and we therefore recommend that the Commissions include in their final rules, or the accompanying release, a clear statement that businesses owned and operated by individuals as proprietorships are included with the term "proprietorship" in Section 1a(18)(A)(5), including sole proprietorships composed of individuals owning and operating a business.

The Banks appreciate the opportunity to provide our comments to the Commissions on these important issues relating to the status of our respective customers that wish to qualify as ECPs and welcome the opportunity to discuss any questions the Commissions may have with respect to our comments. Any questions about this letter may be directed to any of the Banks by contacting Kenneth M. Raisler (212-558-4675) or David J. Gilberg (212-558-4680) at Sullivan & Cromwell LLP.

Sincerely,

Branch Banking and Trust Company

East West Bank

Fifth Third Bank

The PrivateBank and Trust Company

Regions Bank

SunTrust Bank

U.S. Bank National Association

Wells Fargo Bank, N.A.